

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FREDDIE BURSE,

Defendant-Appellee.

UNPUBLISHED

August 8, 2000

No. 215862

Wayne Circuit Court

LC No. 98-900061

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the circuit court's order affirming the district court's dismissal of this case. We reverse the circuit court's order and remand this matter to the district court for further proceedings.

Defendant was charged with domestic assault, MCL 750.81(2); MSA 28.276(2), a misdemeanor.¹ On December 5, 1997, the complainant, defendant's wife, telephoned 911 and requested assistance. When police arrived approximately fifteen minutes later, the complainant reported that defendant had hit her and that she was fearful he would do so again. The police reported that the complainant had visible injuries. Plaintiff indicated to the district court that the officers would testify that the complainant was "in extreme hysteria."

At a pre-trial proceeding in district court, plaintiff indicated that it would attempt to introduce the complainant's statement to the police as an excited utterance pursuant to MRE 803(2). Defendant opposed introduction of the statement. The complainant was sworn as a witness and testified that defendant had not assaulted her. She stated that her injuries resulted from a fall down stairs after an argument. The complainant stated that she did not want the case to go forward. The district court held

¹ On appeal, plaintiff takes the position that the district court abused its discretion by refusing to bind defendant over for trial. However, because defendant was initially charged with a misdemeanor, the proceeding in the district court was not a preliminary examination to determine if defendant should be bound over to circuit court. See MCL 766.4; MSA 28.922; MCL 766.13; MSA 28.931.

that the complainant's statement was not an excited utterance and dismissed the case. Subsequently, the district court denied plaintiff's motion for reconsideration on the grounds that the complainant's statement was not admissible as an excited utterance and that the complainant's testimony that defendant did not assault her was credible. Plaintiff appealed to the circuit court. The circuit court affirmed the district court's decision, finding that the complainant's statement to the police did not constitute an excited utterance.

The decision whether to admit evidence is within the trial court's discretion; an abuse of discretion will not be found by this Court unless an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). Two criteria must be met before a hearsay statement can be admitted into evidence as an excited utterance: (1) there must be a startling event, and (2) the resulting statement must have been made while the declarant was under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551. The existence of a startling event must be shown by evidence that is independent of the statement sought to be admitted. *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989).

Plaintiff argues that the circuit court erred in affirming the district court's conclusion that the complainant's statement was inadmissible as an excited utterance and its dismissal of the case. We agree, reverse the circuit court's order, and remand this matter to the district court for further proceedings consistent with this opinion.

First, we hold that plaintiff offered sufficient independent proof that there was a startling event in this case. Plaintiff offered proof that the police observed physical injuries on the complainant, who was locked outside of her house by defendant, and that she was in a state of extreme hysteria. Thus, there was sufficient proof that the complainant was physically assaulted by her husband, which undoubtedly would qualify as a startling event.

Second, we hold that the complainant's statement was made while she was under the stress of the excitement caused by the alleged assault. The amount of time lapse between the event and the resulting statement is relevant in determining whether the declarant was still under the stress of the event, but is not dispositive. Physical factors such as shock, unconsciousness, or pain may prolong the period in which the risk of fabrication is minimal and acceptable. See *Smith, supra* at 553-554 (ten-hour delay did not render statement regarding sexual assault inadmissible); *People v Kowalak (On Remand)*, 215 Mich App 554, 558-559; 546 NW2d 681 (1996) (forty-five minute delay did not render statement regarding death threat inadmissible). In this case, the police indicated that approximately fifteen minutes after receiving an emergency call from the complainant, she reported that her husband had assaulted her. The complainant had visible injuries consistent with having been

assaulted and was hysterical. We conclude that given the complainant's physical and emotional state when she made the statement, and given the relatively short period that elapsed between the incident and the statement, the district court abused its discretion in holding that the statement was inadmissible as an excited utterance. The circuit court erred in affirming the district court's ruling on this issue.

Moreover, we conclude that the complainant's subsequent assertion that defendant did not assault her did not require the district court to exclude the complainant's statement, which otherwise qualified as an excited utterance. There was sufficient evidence that the complainant had insufficient opportunity to lie prior to making the statement. The complainant made the statement approximately fifteen minutes after calling for police assistance and did not recant until after plaintiff brought charges against defendant based on her allegations. In addition, the complainant's relationship with defendant gave her a motive to recant.

Furthermore, we hold that the circuit court erred in affirming the district court's dismissal of this case. Properly admitted, the complainant's statement would have established the elements of the charged offense of domestic assault, MCL 750.81(2); MSA 28.276(2). Although the statement may have conflicted with the complainant's exculpatory testimony and any other evidence presented by defendant, resolution of such a conflict in the evidence is properly left for the finder of fact. See *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999).

The circuit court's order is reversed and this case is remanded to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh